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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 765

GEORGE SCHAEFFER, JR., and ELSIE SCHAEFFER, his wife; FRANK IMHOF, et al.,

Petitioners.

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

F. W. DURNAN,
Lynden, Washington

DONALD M. BUSHNELL, of counsel,
Ferndale, Washington

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners,[1] pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled cause on July 17, 1963. That judgment reversed the judgment of the United State District Court for the Western District of Washington which had dismissed the complaint of the United States to enforce alleged liens upon lands of Petitioners.

[1]The Schaeffers were served but never entered an appearance at any of the proceedings. Respondent never took a default judgment against them. Their name is used in the caption for the purposes of continuity only; the other Petitioners are the original defendants or, as to the several deaths since occurring, the survivors or other successors of their interests. They number some nineteen owners.

OPINIONS BELOW

The District Court entered no formal opinion. The opinion of the Court of Appeals is reported at 319 F. 2d 907, and is printed at Appendix A-6.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 17, 1963. An order of that Court, timely made, extended the time for filing a petition for re-hearing to September 5, 1963, and petition for rehearing, filed that day, was denied on October 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Where Congress has imposed a condition, admitted below to be precedent, upon the expenditures of an appropriation for construction of a diking project affecting lands in both Indian and private ownership—namely, that all benefited private owners must first execute contracts to reimburse the United States for their several shares of the construction cost—may the Executive Branch (Bureau of Indian Affairs) ignore the condition, and notwithstanding its failure to obtain such contracts from a substantial portion of the private owners, lawfully proceed with construction, and thus frustrate Congressional control of its appropriations?

2. If not, and the Executive having obtained contracts from the remaining such owners, which the Court below concedes contained and were subject precedently to, the said condition, can it be held that the Executive has the power, with respect to the

signing owners, to "waive" the condition on the theory that the condition was for the sole benefit of the government, and ground recovery from them thereon; may it, in its contractual dealings with its citizens, assert as a crucial right the very act which Congress has made unlawful?

3. Over and above the question of illegality, but in the light of the prohibition, can it be held that the inclusion of the conditions in such contracts was solely for the benefit of the Government, when the contracts recited (1) that the signers desired to participate only under the "stated conditions;" (2) that they were covenanting not only with the Government but with all other such owners; (3) that the consideration was not only the construction of the Project but the reciprocal covenants and contracts of all such other owners; and where such covenants included the promises to pay not only the construction costs mentioned in the Congressional Act but all future maintenance and improvements costs in perpetuity?

4. Under the contracts and under the circumstances reflected in the foregoing questions, may the Government recover judgment against the signers?

STATUTORY PROVISIONS

The pertinent Act of Congress is the Act of March 18, 1926, 44 Stat. 211, hereinafter referred to as the Act. This is set forth at Appendix A1. Also involved are the constitutional powers of Congress over appropriations, under Article I, Section 9, Cl. 7 of the United States Constitution.

STATEMENT

Jurisdiction of the district court of this action restedupon 28 U.S.C.A. 1345.

Certain alluvial lands near the mouth of the Nooksack River in Western coastal Washington were partly in and partly without the Lummi Indian Reservation. Most bordered on salt water marshes. To make effective any dikes built to drain that area it was necessary also to dike against overflows of the river. The lands of most of the petitioners were in a bow between the east reservation boundary and the river. By initiative of parties unknown to petitioners or their predecessors the Bureau of Indian Affairs of the Department of the Interior (hereafter called the Bureau) under its Secretary (hereafter called the Secretary) obtained the passage of the Act in 1926. It is set forth at Appendix A1.

The Act appropriated funds for the dikes, but on condition that owners of all benefited private lands first execute contracts for repayment of their equitable shares. There were about 4000 acres in the project Private owners of some 500 acres within the reservation never signed (referred to hereafter as non-signers). The owners of a few tracts within the reservation did sign, including those of three of the some twenty tracts involved in this case. The majority of petitioners, inside the bow, signed with reluctance and under threat that if they did not the Bureau would build the dike along the east reservation boundary, which would make their lands a sluice way at times of high water and inevitably wash them into the sea. These lands were not affected by salt water and the occasional floods thereto-

fore (by no means annual) rose gently and escaped quickly to the southwest to the salt marsh area, compensating for the inconvenience by the enriching silt so deposited.

The ensuing events may best be stated in the words of the Ninth Circuit Court of Appeals in the prior case (1958) involving the project, *Hood v. U.S.*, 256 F. 2d, hereinafter referred to as the Hood case, at Page 525:

> "*As to a great deal of acreage*[2] the Department to the Interior did not obey the *specific injunction of Congress* that no money should be expended until repayment contracts were executed by the owners of private lands benefitted. Instead the construction was completed and . . . the Secretary . . : pursuant to Sec. 4 of the Act . . . promulgated his 'public notice'[3] . . . distributing the total cost . . . with a schedule. In this were included lands of a number of white (non-signing) owners . . . against whom [the notice] apparently imposed a lien.'"

Sovereign inviolability to suit had left the non-signing owners without remedy to clear their titles until what is now 28 U.S.C.A. 1442 was extended to suits against the United States. Thereafter the non-signers sued to quiet their titles, culminating in the Hood case.

Title pressures incidental to financing of sale caused some of these petitioners to make some payments but substantially they refused. The amounts now involved are upwards of $50,000.00 plus un-

[2]Emphases throughout this Petition are Petitioners' own.

[3]Set for in 25 C.F.R. (1949 Ed) Sec. 144.

countable future liability for operation, maintenance and such "improvements" as the Secretary, without the consent of the owners being required, might cause to be made. Fully as serious is that the latter is such a drag on sale of lands, highly productive before the dikes were built, as generally to confine them to persons of independent means.

Pending the Hood case the United States brought this action for foreclosure of its claimed liens on the signers' land, based on the contracts. The full text of the contracts appears as Appendix A1. The first "whereas" clause quotes the Act in full. The second emphasizes the condition precedent by requoting the section containing it. It then has the signer recite his desire for the benefits *"under the conditions* hereinafter stated," and the covenanting clause has him contract with the Secretary and with "all other owners" to pay, if the dikes be built, not only for construction but for operation, maintenance and such improvements as the Secretary (without any consent from the owners) might arrange, and concludes with a provision that work should start only when all private owners had signed.

The case came on for trial on a pre-trial order approved by both parties and made to supersede the pleadings. It embraced admitted facts, respective contentions of the parties, issues of fact and of law. In none of these was it either stated or suggested that there was involved any right, claim of right, issue of fact or law respecting waiver.

The government has not sought to increase the original construction charges. It claims operation and maintenance charges on a pro rata basis. There

is no showing that any subsequent Congress has appropriated for payment of the charges of either construction or operation attributable to the non-signing lands; much less that any future Congress could be committed thereto. So unless Congress volunteers to do so, petitioners must share in such costs or see the project waste for lack of repair.

Thus petitioners' burdens are inevitably increased, and they are deprived of the reciprocal contracts of "all the other owners" which they had bargained for, and for which the performance of the condition was essential.

Such was the view of the trial court, in holding that there was a condition precedent. He made no written opinion but his oral pronouncement was that judgment for the government would impose upon petitioners a different contract than that which they signed: one burdening them to share operation costs—without which the initial investment would be unjustified—not with "all other owners" but only such fewer, in violation of law, whom the Secretary might determine.

The Court of Appeals held that the covenanting clause, above quoted, of the contract does not of itself contain words of condition; hence, the failure to obtain unanimity was only a partial breach which did not "go to the root of the contract," and therefore would not be fatal. But says the Court:

> "As for the remaining portion of the contract it *must be conceded* that these and Sec. 3 of the Act, contain words of condition. Appellees fail to distinguish, however, between conditions contained in the Act and the contracts which

> benefit the United States, and conditions which inure to their own benefit. We think it manifest that the condition stated is solely for the benefit of the United States."

and went on to state that a party may waive a condition made for its own benefit. A little later, attempting to avoid the consequences of illegality, and apropos to the holding thereon of the Hood case, it said:

> "The mere fact that some landowners failed to sign contracts and the agents of appellant violated the law in proceeding with construction in the absence of these contracts, does not preclude appellant from collecting [from the signers] . . . The condition . . . was for the benefit of the United States and *could be waived by it through performance of its part of the obligation.*"

Thus, the court below concedes (1) the existence of the condition precedent; (2) the fact of its breach; (3) the illegality inherent in its breach; that is, in the failure "to obey the specific injunction of Congress;" and (4) bottoms its conclusion upon a claim of right of waiver constituted from the very act or deed it has conceded to be illegal.

No authority was cited sanctioning a waiver based upon an illegal act, nor was the issue of such waiver by the government at any time raised in any proceeding below. THE UNITED STATES IN ITS BRIEF BELOW contended that "the clause which the district court construed to be a condition precedent was no more than a failure of consideration;" and was a mere partial failure which did not go to the root of the contract; that there were words of condition involved. The Court of Appeals did find

that there was a condition but that it was waived by an act of illegality. Petitioners never had a fair opportunity to meet that contention. The rules forbade, in the petition for rehearing, anything more than very brief statement of contentions without supporting authority or argument.

REASONS FOR GRANTING THE WRIT

The basis on which the Court of Appeals reversed the trial court is so completely novel, so contrary to sound public policy, and so violent an intrusion into the concept of the separation of Executive and Congressional powers, so drastically condones Executive bad faith in dealings with the citizenry, and so baldly bases contractual recovery by the government in contracts with private citizens upon an admitted violation of law incorporated into the contracts that the exercise of this court's discretion to review seems to be wholly justified if not compelled. In addition the court has so far departed from the accepted course of judicial proceedings as to call for supervision.

We recognize that the foregoing statements are extreme. We submit that the record justifies them.

A. THERE IS UNPRECEDENTED USURPATION BY THE EXECUTIVE OF CONGRESSIONAL PREROGATIVE.

We need not elaborate that the principle of the separation of the powers of government is fundamental to the very existence of constitutional government and a chief merit of the American system of government. 11 *Am. Jur.* 880. Especially is this

true with respect to Congressional "power of the purse," having in mind the important part played in the long struggle for legislative control over the executive, the fruits of which this nation inherited.

In this case Congress authorized expenditures for construction of the dikes only on the admitted condition that all private owners sign repayment contracts. The intent was clear: no public money was to be spent for the benefit of private owners without reimbursement. Absent the contracts, there was, in effect, no appropriation.

In preparing the contracts, the Executive recognized this. But failing to meet the condition it went ahead regardless, causing the Court in the Hood case *supra*, to say:

> "It is *abundantly clear* also that the agents of the Secretary of the Interior *violated the Act of Congress* by failing to obtain . . . contracts . . . before expenditure of *any money*."

We will not labor "the fundamental role that a public officer who has only such authority as is conferred on him by law, may make for the government which he represents only such contracts as he is authorized by law to make, and must comply with the requirements of the law in respect to the manner in which, and the conditions upon which the contracts may be entered into." 54 *Am. Jur.* 570, Sec. 60.

The rule follows also from Art. I, Sec. IX, 7, of the Constitution, which provides that "No money shall be drawn from the treasury, but in consequence of appropriations made by law."

The Court below admits the rule when it says

that the agents violated the law. But in the next breath it says that the condition was waived, *ipso facto*, by the very act of construction. That act was performed by the Executive. Since construction and expenditure and appropriation are facets of the same act this is tantamount to allowing the Executive to appropriate. In short, he is given the right to convert a conditional appropriation into one discretionary to him. Here then is a clear trespass upon Congressional prerogative.

The vice of this trespass is that the Court in effect brands it as a matter of right. Before there can be a waiver there must be an existing right to waive. That follows from the very nature of the waiver, the most common and accepted definition of which is that it is the "voluntary relinquishment of a known right," 92 *C.J.S.* 1041. "It is generally recognized that one of the constituent elements of a waiver is an existing right . . . which must be in existence at the time. . . . Thus one cannot waive that which is not his as of right at the time of the waiver, or before he is in a position to assert it, and there can be no waiver of a non-existent right." 92 *C.J.S.* 1055, *Yates v. American Republics Co.*, CCANM, 163 F.2d 178; *Coca Cola Bottling Co. Inc. v. Commissioner of Int. Rev.*, CCA 8th 127 F.2d 430; *Garvy v. Blatchford Calf Meal Co.*, CCA Ill. 119 F.2d 973.

The logic works equally in reverse. If the court holds there is a waiver, it is holding that there is a right. The contradiction—that the exercise of the right is admittedly unlawful—cannot be reconciled.

B. AN IMPORTANT FEDERAL QUESTION IS PRESENTED.

Whether such a "specific injunction" to the Executive may be ignored by it is indeed a question of importance far beyond the limits of this case. Confidence in our government is at the heart of national existence. This is surely true in the orbit of the ordinary business transactions between the sovereign and the citizen. Human fallibility is expected in the administration of governmental affairs, but when it is condoned genuine mischief results.

So here, the agents of the Secretary erred in causing him to give public notice to a falsity. The real harm, however, is the decision of the court which elevates this violation of law to the status of a right. It is as if to say: The Executive defies Congress and broke the law but what of it? In your dealings with him, so far as the law governing them, you deal at your own risk.

We have said this case is novel. We have found no precedent for the Court's holding. We believe there is none. We submit that on the question here involved the Court below submitted no authority. It is true that it cited *Stewart v. Griffith* (1910), 217 U.S. 323; 30 S. Ct. 528; 54 L. Ed. 782. But that was only to the proposition that a party for whose benefit a particular condition was inserted in a contract could waive the same. There is no dispute on such a generality. There the plaintiff bought land on a time contract. The purchaser was required to pay by a certain date. If he failed the contract was to be forfeited. After failing to pay the purchaser resisted suit for specific performance on the ground that for-

feiture was automatic. The court correctly held that the forfeiture was solely for the benefit of the seller.

What that case actually held was that an obligor could not take advantage of his own default in order to evade a covenant to pay. The forfeiture provision simply offered an election of remedies to the opposite party. To apply that rule to the case at bar would be to say that the government could not take advantage of its own wrong in failing to obtain unanimity by proceeding without attaining it.

To make the cases analogous, the contracts here would have to provide also that before the government would be obligated to proceed with construction the owners should deposit certain sums on account. Then, if all had signed, but not all had paid (and there being no law requiring the deposits) the government could properly proceed because it had inserted the prepayment provision for its own benefit.

In any event no factor of illegality was involved. The heart of our case is the sanction of executive violation of law, and that is not touched in that case. It follows that this case, if it stands, will be a startling new precedent for the results noted herein.

C. THE DEPARTURE BY THE COURT BELOW FROM NORMAL PROCEDURE REQUIRES CORRECTION.

Our claim under this head is that the Circuit Court grievously failed to follow normal procedure because it rested its decision on a point not previously raised, thereby depriving petitioners of any opportunity of combating it.

We have shown that waiver was neither urged or mentioned at any stage below. Waiver has always been considered an affirmative defense. It is a well established rule that the reviewing court will not, except in rare cases consider a point not raised below, except for jurisdiction, Cyc. of Fed. Procedure Sec. 67.09.

Exceptions might exist as where the facts are not in dispute, and the record clearly makes the new point decisive. But here the facts and law conclusively demonstrate the unavailability of waiver, especially in the light of the rule that it must be manifested by some unequivocal manner by some positive act, which is inconsistent with the continued assertion of the right in question, 92 *C.J.S.* 1064, *Yates v. American Republics Co.*, supra; *Coca Cola Bottling Co. v. Commissioner of Int. Rev.*, supra *Garvy v. Blatchford*, supra, and may not be inferred from doubtful acts; *Dewbar v. Farnum*, 196 A. 237, 107 Vt. 313, 114 ALR 996.

Intent, as we have seen, is of the essence. Its absence here is shown by various means. First, the agents by the public notice claimed that all owners had signed. Although that was false, it was, in form, obedient to the law and was not an assertion of an intent to violate it. Second, the agents emphasized the need for unanimity in their effort to attain by procuring the supplemental agreement. Therein they recited the need for unanimous signing and the failure of one owner to sign, representing that he was the only non-signer and requested the other signers to agree to absorb his assessments. If they intended to waive that would have been unnec-

essary. Incidentally, it is a puzzle as to why this was done as to a forty-acre tract of one owner and not as to seven owners having 500 acres. Presumably, at the time they expected the seven to sign and, upon refusal decided to take the chance that title problems and persistent billing would cajole or bluff them into compliance. Third, the waiver as shown was unlawful. Fourth, it was only the Secretary who had the authority to waive—if any authority could be said to exist. And the Secretary had no such intent. He could not have had because he was unaware of the circumstances. The public notice submitted to him by his agents negated waiver. Actual intent to violate the law cannot be ascribed to one of his station.

Petitioners had no reasonable opportunity to present these or any other opposing views. The injection of the issue, much more the pivoting of the decision thereon, was contrary to accepted practice and grossly unfair to petitioners.

D. THE CONDITION WAS NOT FOR THE SOLE BENEFIT OF THE UNITED STATES.

It is basic to the logic of the Court's holding that the conditions were *solely* for the benefit of the respondent. Various reasons negate this:

(1) To so hold would have made the owners conscious participants in an illegal scheme. "It is for Congress, under the Constitution, to say what amount may be drawn from the Treasury in pursuance of an appropriation, and if an officer, upon his responsibility, without authority of Congress, assumes to undertake to bind the government to pay a sum in excess of that the contract is a nullity. . . .

and no obligation arises upon its part to meet its provisions." 54 *Am. Jur.* 571; *Sutton v. U.S.*, 256 *U.S.* 575, 65 *L. Ed.* 1099, 41 *S. Ct* 563, 19 *A.L.R.* 403 and annotation at p. 409. If the condition was solely for respondent's benefit, it must have been contemplated at the outset that it could be waived. If the contracts were honestly negotiated, the owners would have been so informed, and thus have connived to have the dike built contrary to law.

(2) By the same logic the Secretary himself would have been so involved.

(3) Since contractors dealing with the government are limited to actual appropriations and charged with notice, they would have also connived.

(4) To ascribe all benefits to respondent flies in the fact of the language and purpose of the contracts. Maintenance was integral to the contract. The only funds therefore were the charges against the owners. The omission of any owner inevitably increased the burdens of the others. Each owner by terms of the contract was to contract each and all of the others. Only the adherence to the condition would achieve that result, and accomplish the pro rata charges so contemplated.

(5) Respondent prepared the contract. The inclusion of the condition was unnecessary so far as it was concerned. If omitted, the statute itself would have justified refusal to proceed if the condition were not met. But the inclusion was necessary to establish rights to the owners. It was furthermore an enticement. The desire for equal treatment is basic in human nature. The project could not have been

sold to the owners if there had been any thought that some 12 percent of the choicest portions would escape assessment. The agents simply could not face up to the prospect of returning to petitioners a second time and asking for a second supplemental contract for 500 acres more. Faced with dropping the project or the exercise of deceit on their superiors they chose the latter. Fundamentally it is this unconscionable action which has been sanctioned below, and cannot constitute a benefit to respondent.

It follows from all the foregoing that the four questions first raised herein must be answered in the negative.

CONCLUSION

For the foregoing reasons petitioners pray that this petition for certiorari be granted and the case remanded to the Court of Appeals with directions to reinstate the judgment of the District Court.

Respectfully submitted,

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January 10, 1964

APPENDIX

Landowner's Agreement with the Secretary of the Interior

Lummi Project — Act of March 18, 1926

WHEREAS an Act of Congress approved March 18, 1926, entitled "An Act for the purpose of reclaiming certain lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington, and for other purposes" provides:

That there is hereby authorized to be appropriated the sum of $65,000 or so much thereof as may be required, for reclaiming by construction of dikes approximately four thousand acres of lands in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington: *Provided*, that the total cost of the project shall be distributed equitably among the lands in Indian ownership and the lands in private ownership that may be benefited in accordance with the benefits received as designated by the Secretary of the Interior.

Sec. 2. The construction charge properly assessable against the Indian lands shall be reimbursed to the Treasury of the United States under such rules an regulations as the Secretary of the Interior may prescribe, and there is hereby created a lien against all such lands, which lien shall be recited in any patent issued therefor, prior to the reimbursement of the total amount chargeable against such lands.

Sec. 3. No part of the sum provided for herein shall be expended for construction on account of any

lands in private ownership until an appropriate repayment contract in accordance with the terms of this Act and in form approved by the Secretary of the Interior shall have been properly executed by the landowners whose lands may be benefited by the project.

Sec. 4. The Secretary of the Interior is hereby authorized and directed to declare by public notice the cost of the project and the equitable share to be assessed against the lands benefited in accordance with their respective benefits, which cost shall be repaid in annual installments, the first installment to be 5 per centum of the total charge and be due and payable on the 1st day of December of the third year following the date of such public notice, the remainder of the said cost with interest on deferred amounts against land in private ownership from the date of said public notice to be 4 per centum per annum to be payable on each December 1 thereafter, on the same basis as the first installment, until the obligation is paid in full.

Sec. 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

And whereas Section 3 of the Act provides that no part of the sum provided for therein shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of the Act and in form approved by the Secretary of the Interior shall have been properly executed by such landown-

ers whose lands may be benefited by the project.

And Whereas the undersigned declares that he is the owner of approximately 170 acres of land adjacent to the Lummi Indian Reservation, which will benefit by the construction of the project authorized by said Act, which he wishes to have included within the project for the purpose of benefiting such lands under the conditions hereinafter stated.

Now, therefore, and in order to aid in the accomplishment of the purposes of the Act, the said undersigned owner of the lands aforesaid covenants, promises, and agrees to and with the Secretary of the Interior and with all other landowners whose lands may be included within the project, in consideration of the premises, the promises of said other landowners, and the work to be done by the United States in connection with the project, that if the Secretary of the Interior shall construct dikes for the purpose contemplated in the Act, said lands shall at once be and become burdened with and subject to a first lien, so far as this agreement can make the same a first lien, to secure to the United States the full payment of a prorata share of the entire cost of said project and all of the betterment, operation, and maintenance charges, and penalties in connection therewith; and the undersigned further hereby agrees that, if and when notified to do so by the Secretary of the Interior or his duly authorized agent or agents, he will promptly further convey or cause to be conveyed to the United States by good and sufficient deeds or other instructions satisfactory to the Secretary of the Interior, for use upon and in connection with said project to assure the repayment of the pro rata share of the entire cost of the project prop-

erly apportionable to said lands, which lands are described as follows: (description omitted).

The undersigned further covenants and agrees that after the completion of the project and the issuance of public notice by the said Secretary of the Interior as provided for in Section 4 of the Act he shall promptly make payment of the first installment amounting to five (5) per centum of the total (total) charge on the 1st day of December of the third year following the date of the issuance of public notice, and that he shall pay each succeeding installment on each December 1st thereafter until the total indebtednes shall have been paid; that said undersigned shall have the right to pay on the due date of the first installment the total assessment against his lands; otherwise he shall pay an interest charge on all installments except the first, at the rate of four (4) per centum which shall be computed from the date of the issuance of said public notice. The undersigned may at any time, however, prior to the due dates pay the total of the then unpaid indebtedness.

The undersigned further agrees to furnish the Secretary of the Interior or his agents, within 30 days from demand by any such agent, proper abstracts of title covering his said lands; and failing so to do hereby authorizes him or his agents to obtain same at said owner's expense. Said abstracts after examination shall be returned to their owners.

The undersigned further agrees and promises, should it be necessary to incur any additional expense for betterment, operation or maintenance of the said diking system after the project shall have

been constructed and public notice issued therefor, to pay his proper proportionate share of such betterment, operation and maintenance costs, which amounts shall be paid in addition to the sum fixed by the public notice and shall be paid in accordance with rules and regulations that may be issued by said Secretary of the Interior.

It is understood and agreed that the work shall be undertaken and completed as rapidly as conditions warrant after contract shall have been obtained from the owners of the private lands coming within the project.

After payment shall have been made by the undersigned of the total obligation assessable against his lands, the said Secretary of the Interior shall issue a relinquishment of the lien herein created against such lands. Such relinquishment, however, shall not be construed as relieving the landowner from paying his proportionate share of any betterment, maintenance and operation costs that may accrue from time to time in operating and maintaining the project.

This agreement shall be binding upon and shall inure to the benefit of the heirs, executors, administrators, and assigns of the parties hereto.

IN WITNESS WHEREOF the undersigned have hereunto set their hand and seal this 20th day of January, 1928.

(Signature and acknowledgement omitted.)

Approved: Aug. 3, 1928.

E. C. Finney,
First Assistant Secretary,

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGE SCHAEFFER, JR., and ELSIE SCHAEFFER, his wife, et al.,
Appellees.

No. 18,291

July 17, 1963

On Appeal from the United States District Court for the Western District of Washington

Before: JERTBERG and BROWNING, Circuit Judges and JAMESON, District Judge

JAMESON, District Judge:

Appellant brought this action to recover construction and maintenance costs, enforce covenants running with the land, and foreclose liens, pursuant to repayment contracts executed by the appellees or their predecessors in title, in connection with the Lummi Diking Project constructed by the Government pursuant to the Act of March 18, 1926, 44 Stat. 211.[1] The district court entered summary judgment

[1]The Act authorized an appropriation "for reclaiming by construction of dikes approximately four thousand acres of land in Indian and private ownership within and immediately adjacent to the Lummi Indian Reservation, in the State of Washington: *Provided*, That the total cost of the project shall be distributed equitably among the land in Indian ownership and the lands in private ownership that may be benefited in accordance with the benefits received as designated by the Secretary of the Interior". It provided for the reim-

for the appellees, based upon facts admitted in a pretrial order, holding that there was a "fatal want of equity as to the case of the plaintiff, and in particular that any and all rights it may have had * * * were subject to a certain condition precedent and that the same was not fulfilled, and that in no other respects has it any lawful grounds of recovery * * * or does it have or passess any lawful lien * * *". The United States has appealed from the summary judgment.

The purpose of the Lummi Diking Project was to construct dikes for the protection of lands within the Lummi Indian Reservation and those in private ownership adjoining the reservation on the east, including the lands here involved, from the overflow of fresh water at flood stages from the Nooksack River, the eastern boundary of the project lands and the overflow by saltwater tides from the Lummi River on the southwest side of the reservation.

bursement of construction charges assessable against the Indian lands and for a lien against such lands. With respect to lands in private ownership, it provided:

> "Sec. 3. No part of the sum provided for herein shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of this Act and in form approved by the Secretary of the Interior shall have been properly executed by the landowners whose lands may be benefited by the project."

The Secretary of the Interior was "authorized and directed to declare by public notice the cost of the project and the equitable share to be assessed against the lands benefited in accordance with their respective benefits", the costs to be repaid in annual installments as set forth in the Act.

All of the appellees executed repayment contracts in which they agreed "to and with the Secretary of the Interior and with all other landowners whose lands may be included within the project, in consideration of the premises, the promises of said other landowners, and the work to be done by the United States in connection with the project, that if the Secretary * * * shall construct dikes for the purpose contemplated in the Act", their lands "shall at once be and become burdened with and subject to a first lien" to secure "the full payment of a pro rata share of the entire cost of said project and all of the betterment, operation and maintenance charges, and penalties in connection therewith; * * *".[2]

Prior to the execution of the contracts, the appellees or their predecessors in title were notified that the Secretary of the Interior had determined the identity and area of the lands to be benefited. He had divided the lands in four classes, according to the relative benefits. Appellees' lands were in ClassI, were not affected by the salt water tides, and the construction charge was fixed at $8.00 per acre.

Before commencing construction, the Secretary's agents obtained repayment contracts from all except one of the owners of pricate lands *outside* the reservation in the same area with appellees. The

[2]The major portion of the project lands was in Indian ownership. Upon solicitation of the Secretary, through his agents, instruments substantially identical to those executed by appellees were executed by 49 of 62 Indian owners and by "various other owners of private lands within reservation boundaries". The lands in Indian ownership and other lands inside the reservation are not involved in this action

owners of the other lands outside the reservation executed a supplemental agreement under which they agreed to assume their respective shares of the cost assessable against the nonsigning owner.

The Secretary proceeded to construct the dikes and expend the funds appropriated by Congress without procuring the execution of repayment contracts from the owners of seven tracts of land in private ownership located *inside* the reservation. This court held in *Hood v. United States*, 1958, 256 F.2d 522, that there was no lien upon those tracts, that they were improperly included by the Secretary in the schedule of charges allocating pro rata costs of construction, and that there was no basis for the imposition of any charge for operation and maintenance. The title of the landowners was quieted against the claims of the Government.

On August 9, 1930, after construction was completed, the Secretary issued the "public notice" required by the Act, fixing the construction costs assessed against each acre in the project, and payment terms. 25 CFR (1949 ed) § 144. This notice included the names and lands of the seven nonsigning owners within the reservation. Prior to the final determination of *Hood v. United States*, supra, the Secretary claimed and asserted that the Government had valid liens against those lands.

There has been no change in the allocation of construction costs among appellees by reason of the determination that the Government has no lien or claim against the lands of the seven nonsigning owners. Appellees do not dispute the distribution of the construction costs, but do dispute their

validity.

Since the completion of the construction, assessments have been made against the owners of all lands for the cost of operation and maintenance on a pro rata basis.[3] Prior to the decision in the Hood case, the Government claimed a lien for maintenance and operation charges against all lands in private ownership, including the lands of non-signers.

Appellees and their predecessors in title have made some payments on both construction charges and operation and maintenance charges, but have refused and neglected to make others.

Three questions are presented:

1. Whether the rights of the United States were subject to a condition precedent which had not been fulfilled, because the seven landowners did not execute similar contracts,

2. Whether the United States has a lien on the properties of appellees in view of the contract provision that if the Secretary of the Interior shall construct the dikes for the purpose contemplated in the Act, the lands shall at once become burdened with and subject to a first lien.

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[3]While construction costs were classified on the basis of varying benefits, operation and maintenance charges were assessed on a flat per acre basis. Appellees contended that the flat charges were excessive and were not the "equitable charges" required by the instruments they executed. This issue was not determined in view of the trial court's conclusion as a matter of law that the Government had no valid lien for either construction charges or operation and miantenance charges.

3. Whether under the admitted facts there is a fatal want of equity to justify the position of the claimed liens because of lack by appellant of fair dealing with appellees, and impossibility of enforcing the alleged contracts without, in effect, writing new contracts and imposing inequitable burdens.

Appellees contend that the execution of the repayment contracts by *all* private landowners within the project was a condition precedent, that the dikes accordingly were constructed in violation of law, and that appellees are not obligated under their contracts to pay the delinquent assessments for either construction or maintenance. Appellant contends that obtaining repayment contracts from all of the private landowners was not a condition precedent to the validity of the contracts with appellees, and the fact that a few landowners did not execute contracts was at most a partial failure of consideration which would not terminate the contracts.

A condition precedent is "a fact (other than mere lapse of time) which * * * must exist or occur before a duty of immediate performance of a promise arises; * * *". Restatement of the Law, Contracts, § 250. Williston defines a condition precedent as "a fact or event which the parties intend must exist or take place before there is a right to performance". 5 Williston on Contracts 3d ed., 126-127, § 663, quoting from *Lach v. Cahill*, 138 Conn. 418, 85 A.2d 481.

"No particular form of words is necessary in order to create an express condition. Whether a promise is expressly conditional, and if so what is the nature of the condition, depend upon interpretation." Restatement, supra, § 258. The intent of the

parties must be ascertained from a fair and reasonable construction of the language of the contract in the light of the surrounding facts and circumstances.[4] Conditions precedent are not favored and the courts will not construe stipulations as conditions unless required to do so by plain, unambiguous language.[5]

Williston distinguishes between a condition and a promise and the respective consequences of their breach. A condition creates no right or duty of and in itself, but is merely a limiting or modifying factor. If it is breached or does not occur, the promise acquires no right to enforce the promise. A promise raises a duty to perform and its breach subjects the promisor to liability and damages, but does not necessarily excuse performance by the other party. 5 Williston, supra, § § 663 and 665.

A partial failure of consideration does not excuse performance by the other party to a contract or give him a right of rescission. Such failure is merely ground for abatement of damages unless it goes to

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[4]See 17 C.J.S. 792, 793, 794, Contracts § 338; 12 A. Jur. 848, 849, Contracts § § 295, 296; 5 Williston, supra, § 663; *Partlow v. Mathews*, Wash. en Banc, 1953, 261 P.2d 394, 398.

[5]See 5 Williston, supra § 665; 17 C.J.S. 794, Contracts § 338, supra; *Superior Portland Cement v. Pacific Coast Cement Co.*, 1949, 33 Wash.2d 469, 205 P.2d 597, 616; *Fischler v. Nicklin*, 1958, 51 Wash. 2d 518, 319 P.2d 1098, 1101; *Kasishke v. Baker*, 10 Cir. 1944, 146 F.2d 113, 115.

the root of the contract.[6] Moreover, "If one of two considerations for a contract is insufficient, but not illegal, the other, if sufficient, will support the contract. Similarly, although part of the consideration is insufficient consideration, a contract may be supported by the residue of the consideration if good per se." 12 Am.Jur. 612, Contracts § 118.[7]

There is little or no disagreement with respect to these rules. The parties are in conflict as to which are applicable here. This must be resolved by interpretation of the contract and the Act of Congress under which it was made. The contract, inter alia, restates the provision of section 3 of the Act (see note 1, supra) and continues in pertinent part: "* * * *the said undersigned owner of the lands aforesaid covenants, promises, and agrees to and with the Secretary of the Interior and with all other landowners whose lands may be included within the project, in consideration of the premises, the promises of said other landowners, and the work to be done by the United States in connection with the project,* that if the Secretary of the Interior shall construct dikes for the purpose contemplated in the Act, said lands shall at once be and become burdened with and subject to a first lien, so far as this agree-

[6] See 12 Am.Jur. 927, Contracts § 360; 17 C.J.S. 477, Contracts § 130; *Colonial Insurance Company v. Grad*, 1955, 102 Ohio App. 430, 129 N.E.2d 491, 496; *Neely v. White*, 1941, 177 Va. 358, 14 S.E.2d 337, 340-341; *King v. Moreland*, 1931, 116 Cal.App. 356, 2 P.2d 576; *Farmers and Miners' State Bank v. Probst*, 1928, 81 Mont. 248, 263 P. 693, 697.

[7] This rule was quoted with approval in *Luther v. National Bank of Commerce*, Wash. 1940, 98 P.2d 667, 673. See also Restatement, supra, § 84 (b).

ment can make the same a first lien, to secure to the United States the full payment of a pro rata share of the entire cost of said project and all of the betterment, operation, and maintenance charges and penalties in connection therewith: * * *." (Emphasis suplied.)

The italicized portion of the contract does not contain words of condition with respect to the "other landowners whose lands may be included within the project", but clearly includes "the promises of said other landowners" as a part of the consideration for the contract. As to that portion of the contract, the failure of other landowners to sign repayment contracts is an insubstantial failure of consideration. Obviously the primary and fundamental consideration for the liens and promises to repay is "the work to be done by the United States in connection with the project * * *".

As for the remaining portions of the contract set forth, it must be conceded that these, and section 3 of the Act, contain words of condition. Appellees fail to distinguish, however, between conditions contained in the Act and the contracts which benefit the United States, and conditions which would enure to their own benefit. We think it manifest that the condition stated is solely for the benefit of the United States.

A party may waive a condition inserted in a contract for his own benefit. In *Stewart v. Griffith*, 1910, 217 U.S. 323, 30 S. Ct. 528, 54 L.Ed. 782, a vendor was held entitled to specific performance under a real estate contract. A condition of the contract required payment of a certain sum by the vendee upon a

certain date or the contract was to be forfeited and the conveyance thereunder rendered null and void. The court said: "The condition plainly is for the benefit of the vendor, and hardly less plainly for his benefit alone, * * *. This being so, the word 'void' means voidable at the vendor's election, and the condition may be insisted upon or waived, at his choice." 217 U.S. at 329.

The appellees' primary purpose in executing the contracts was to obtain the reclamation of their lands through federal construction of dikes. It was necessary to agree to repay a proportionate share of the cost of construction and to give the United States a lien upon their lands to secure payment. We think it clear that appellees were bargaining for the construction of dikes—not for the execution of repayment contracts by other landowners. The latter would be material only if the failure of other landowners to execute agreements would increase the cost of construction to be borne by those who did. No contention is made that appellees' costs of construction were thereby increased. The condition which existed was not to assure unanimity of obligation but to assure that the United States would be repaid for sums expended in construction of the project.

Having determined that obtaining repayment contracts from all of the private landowners was not a condition precedent to the validity of the contracts with appellees, it follows that under the Act and contracts the United States has an enforceable lien *against the properties of appellees. See Walker v. Brown*, 1897, 165 U.S. 654, 661, 17 S.Ct. 453, 41 L.Ed

865, 871; *United States v. Butterworth-Judson Corp.*, 1925, 267 U.S. 387, 393, 45 S.Ct. 338, 69 L.Ed. 672.

In support of their reliance upon a "want of equity" on the part of the United States, appellees contend that the Act itself, and particularly the recitals in the contracts, amount to a representation, upon which appellees must have relied, that the project would not be consrtucted unless all land owners whose lands would be thereby affected signed repayment contracts. But this is no more than a restatement of the contention that appellees signed the contracts and agreed to perform thereunder only on condition that everyone whose lands were affected sign a repayment contract. As noted supra, the court finds no condition precedent manifested by the contracts or in the circumstances surrounding their execution.

Appellees argue further that there can be no assurance that the operation and maintenance charges will be "equitably distributed", as required by the contracts, if some of the landowners are exempt from their payment. Questions relating to the "proper measure" of charges for operation and maintenance are included in the issues of fact and law in the pretrial order. We do not presume to pass upon these questions at this time, except to make it clear that operation and maintenance expense chargeable to appellees may not be increased by reason of the failure of appellant to obtain repayment contracts from the nonsigning owners.

Appellees contend finally that the enforcement of the conrtacts against appellees would constitute a judicial sanction of the unlawful acts of appel-

lant's agents. It is true that this court noted in *Hood v. United States;* supra, that the Secretary of the Interior violated the Act of Congress "by failing to obtain repayment contracts from the owners of private lands benefited by the improvement before the expenditure of any money of the appropriation for the construction" of the dikes. Accordingly it was held that, "There was thus no lien upon any of these lands" (referring to the seven tracts owned by nonsigners). This decision may not be extended to those lands where the owners did in fact execute repayment contracts pursuant to the Act. The mere fact that some landowners failed to sign contracts and agents of appellant violated the law in proceeding with construction in the absence of these contracts, does not preclude appellant from collecting from those landowners who did sign contracts, provided their obligation is in no way increased by the failure to obtain contracts from the nonsigners. The condition that all landowners execute contracts was for the benefit of the United States and could be waived by it through performance of its part of the obligation.

It follows that the judgment must be reversed and the cause remanded for further proceedings consistent with this opinion.

(Endorsed) Opinion Filed July 17, 1963.

Frank H. Schmid, Clerk.